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No. 81-2209

In the Supreme Court of the United States

October Term, 1981

HOMER M. MCDOWELL, et ux., d/b/a
MCDOWELL'S AND THEIR SURETY,
TRAVELERS INDEMNITY CO.
Petitioners,
v.
WESTERN WASHINGTON LABORERS-EMPLOYERS
HEALTH & SECURITY TRUST FUND, WESTERN
WASHINGTON LABORERS-EMPLOYERS
PENSION TRUST FUND, AND WESTERN
WASHINGTON LABORERS-EMPLOYERS
TRAINING TRUST FUND
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

Petitioner argues that,

> "In *Higdon* this court reviewed the decision of the National Labor Relations Board (herein the N.L.R.B. or the Board) holding that prehire contracts, although permitted by §8(f) N.L.R.A., 29 U.S.C. §158(f), did not ripen into an enforceable contract until the majority status of the union party to the prehire agreement was achieved. This Court approved the Board's holding that minority prehire contracts need not be honored by the employer party to such agreements until they ripen to enforceability by virtue of attainment of majority. In *Todd v. McNeff,* the Ninth Circuit modifies this rule by holding that prehire contracts must be honored, and may be judicially enforced, until there is an open and clear repudiation of the contract by the employer."

Petitioner also asserts that this decision conflicts with national labor policy and with other Circuit Court decisions. The question presented to this Court is framed by the Petitioner as follows:

> "It is a 'prehire' collective bargaining agreement, i.e., one permitted by Section 8(f) of the National Labor Relations Act, 29 U.S.C. §158(f), signed by a labor organization that had not, either at the time of signing of said agreement, or at any later time, been chosen by a majority of the employees purportedly covered by said agreement, enforceable in an action brought under Section 301, Labor Management Relations Act 1947, as amended, 29 U.S.C. §185?"

The soul of the Petitioner's argument is that *Higdon* renders prehire agreements *void* and unenforceable by any party, in any forum, for any purpose.

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WESTERN WASHINGTON LABORERS-EMPLOYERS HEALTH & SECURITY TRUST FUND, WESTERN WASHINGTON LABORERS-EMPLOYERS PENSION TRUST FUND, AND WESTERN WASHINGTON LABORERS-EMPLOYERS TRAINING TRUST FUND
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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Ninth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents Western Washington Laborers-Employers Health & Security Trust Fund, et al., by their counsel, respectfully request that the petition for writ of certiorari to review the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit filed March 2, 1982 be denied, or that the opinion be summarily affirmed.

STATEMENT OF THE CASE

In January, 1969, the Petitioner signed a compliance agreement with Local Union 252 of the Washington State District Council of Laborers ("Union"). The compliance agreement bound Petitioner to abide the terms and conditions of the current, and subsequent, area wide agreements which the Union independently negotiated with the Associated General Contractors of America covering the Western Washington geographical area. These area wide agreements required the Petitioner to make monthly fringe benefit contribution payments and incorporated the trust agreements establishing the Respondent Trust Funds. The Respondents are third party beneficiaries of the agreements and are joint labor-management trust funds created in accordance with Section 302(c)(5) of the Labor Management Relations Act ("Act"), 29 U.S.C. §186(c)(5).

Throughout the 1969-1978 period, Petitioner completed monthly trust reporting forms, certified its payment of all amounts due, and paid the escalating contribution rates required by the successive area wide agreements. Neither party gave written notice of termination, and the agreement continued uninterrupted from 1969.

In 1978, the Respondents asked to review Petitioner's payroll records to ensure proper reporting and contribution payments. After Petitioner denied voluntary production, this action was commenced in the Superior Court for the State of Washington to compel production and to recover any amounts due. The Petitioner removed this action to federal court. Jurisdiction of the suit was based upon Section 301(a) of the Act, 29 U.S.C. §185(a).

In answer to the complaint, the Petitioner asserted an affirmative defense that the compliance and area wide agreements were void and unenforceable because the Union had never represented a majority of his laborer employees. This defense had not been previously raised, and was offered shortly after this Court's decision in *N.L.R.B. v. Local Union No. 103, Ironworkers (Higdon Contracting Co.)*, 434 U.S. 335 (1978). Peti-

tioner contended that he was entitled to pay contributions only for his Union member laborer employees, although the agreements expressly required payment for all laborers without regard to union affiliation. The advantage of medical and retirement benefits available to Union member laborers who were reported to the Trust Funds were denied to those who were not reported.

The Parties[1/] acknowledged that the Petitioner's agreement was a prehire agreement, but differed as to the legal effect of this fact. Cross motions for summary judgment on the liability issues were filed in October, 1978. The district court granted summary judgment in favor of Petitioner in December, 1979 and dismissed the complaint prior to discovery regarding damages. Appeal from this judgment was taken in January, 1980, and the matter reversed by the Ninth Circuit on March 2, 1982. The case is on remand for consideration of whether the agreements were ever repudiated,[2/] and for a determination of damages.

SUMMARY OF ARGUMENT

The district court erred in applying *Higdon,* an illegal picketing case, to bar a §301(a) suit by third party beneficiary trust funds to recover past due fringe benefit contributions. The Ninth Circuit's decision that prehire agreements are retroactively enforceable properly applies *Higdon,* is consistent with our national labor policy, and satisfies Congressional concerns about this case.

[1/] The Union was not party to this action.

[2/] *Todd v. McNeff,* 667 F.2d 800 (9th Cir. 1982) was authority for the Court's decision.

ARGUMENT AGAINST GRANTING THE WRIT

A.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED, AS THE DECISION OF THE NINTH CIRCUIT POSES NO CONFLICT WITH THE *HIGDON* DECISION

Petitioner's assertion that *Higdon* renders prehire agreements void and unenforceable until a union achieves majority status is contrary to Mr. Justice White's declaration that:

> "Until that time [union's attainment of majority support] the prehire agreement is *voidable* and does not have the same stature as a collective bargaining contract entered into with a union actually representing a majority of the employees and recognized as such by the employer." [434 U.S. at 341] (emphasis added)

In response to the union's argument that the decision rendered prehire agreements nullities, Justice White later responded:

> "The Board's position does not, as respondents claim, render §8(f) meaningless. Except for §8(f), neither the employer nor the union could execute prehire agreements without committing unfair labor practices. Neither has the Board challenged the *voluntary observance* of otherwise valid §8(f) contracts, which is the normal course of events. [434 U.S. at 349] (emphasis added)

In *McDowell, McNeff,* and *Paddack v. Clark,* No. 80-3380 (9th Cir. 2 Mar. 1982),[3/] the Ninth Circuit has adopted a view consistent with *Higdon* that prehire agreements are voidable and retroactively enforceable by employee benefit trust funds until there is an effective repudiation. This is also consistent with related

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[3/] Petitions for writs of certiorari have been filed in *McNeff v. Todd,* (No. 81-2150) and *Clark v. Paddack,* (No. 81-1946).

decisions of the Eighth, Tenth and District of Columbia Circuits.[4/]

Higdon provides little support for Petitioner's argument. The word "unenforceable" appears only twice, and then only in the Court's response to the union's assertion that the decision rendered prehire agreements unenforceable, contrary to *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962). Justice White correctly observed that the single issue in *Lion Dry Goods* was whether jurisdiction under §301(a) of the Act existed in a suit by a minority union against an employer to enforce a strike settlement agreement, the contention being that a §301(a) jurisdiction obtained only in suits involving collective bargaining agreements with majority unions. The Justice stated:

> "The Court [in *Lion Dry Goods*] was nevertheless speaking to an issue of jurisdiction. That a court has jurisdiction to consider a suit on a particular contract does not suggest that the contract is enforceable. It would not be inconsistent with *Lion Dry Goods* for a court to hold that the union's majority standing is subject to litigation in a §301 suit to enforce a §8(f) contract, just as it is in a §8(a)(5) unfair labor practice proceeding, and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable." [434 U.S. at 351-2]

Within the context of the facts presented in *Higdon*, this language is dictum.

In *Higdon*, the Court limited its review to a determination of whether the NLRB correctly decided that the union engaged in recognitional picketing, without a showing of majority support

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[4/]See *Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan, et al. v. Associated Wrecking Company*, 638 F.2d 1128 (8th Cir. 1981); *New Mexico District Council of Carpenters v. The Mayhew Company*, 664 F.2d 215 (10th Cir. 1981); and *Washington Area Carpenters Welfare Fund, et al. v. Overhead Door Co. of Metropolitan Washington*, No. 80-1501 (D. C. Cir. 15 June 1982).

of the employees, thereby violating §8(b)(7)(C) of the Act, 29 U.S.C. §158(b)(7)(C). The Court stated that:

> "The issue for the Board was whether for the purposes of §8(b)(7)(C), the union pickets carrying signs asserting that Higdon was violating an agreement with the union were picketing with the forbidden purpose of requiring Higdon to recognize or bargain with the union." [434 U.S. at 341]

The lead-in phrase of the dictum "(I)t would not be inconsistent with *Lion Dry Goods* for a court to hold . . ." is drawn in the subjunctive. *Higdon* does not hold that prehire agreements are void and unenforceable in §301(a) cases. This fact was misunderstood by the district court, and its error properly corrected by the Ninth Circuit. Since the decisions do not present the conflict asserted by the Petitioner, there is no basis for certiorari.

B.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED, AS THE DECISION OF THE NINTH CIRCUIT IS IN ACCORDANCE WITH THE NATIONAL LABOR POLICY AND SATISFIES CONGRESSIONAL CONCERNS ABOUT THIS CASE

The Ninth Circuit's decision fosters employee freedom, and conforms with Congressional pronouncements of public policy endorsed by this Court.

1. Considerations of Employee Free Choice

Petitioner asserts that this decision defeats the right of employees to select their own collective bargaining representative. To the contrary, in *McNeff,* the Ninth Circuit recognizes the limits placed on minority unions by prehire contracts:

> ". . . allowing a repudiation by the employer, but enforcing the contract until that repudiation occurs seems a cor-

> rect reading of *Higdon*. A minority union will not be able to control an employment situation because an employer can repudiate." [667 F.2d at 303]

Implicit in this language is the understanding that a prehire agreement is not a bar to a petition for a representation election. This follows Justice White's declaration that:

> ". . . a §8(f) contract, which would be invalid absent the section, 'shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).' The employer and its employees and the union itself for that matter—may call for a bargaining representative election at any time." [434 U.S. at 345]

Indeed, in *McDowell* and *McNeff*, considerations of employee freedom are maximized. The Respondent Trust Funds provide benefits to all covered employees without regard to union affiliation. The Petitioner's "union-only" application of the contract poses the greatest danger to employee freedom. By limiting benefits to union members, the Petitioner encourages union membership.[5/]

2. Considerations of Public Pension Policy

On September 26, 1980, the Multiemployer Pension Plan Amendments Act of 1980, Public Law 96-364, 94 Stat. 1208-1311 (1980) (hereafter "MPPAA"), was signed into law. This legislation modified the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq., (hereafter "ERISA"), to provide an express and unambiguous federal cause of action in favor of jointly-trusteed funds against employers to recover delinquent fringe benefit contributions.

Section 306 of MPPAA, 94 Stat. 1295, makes an employer's failure or refusal to pay promised contributions a substantive statutory violation of ERISA, and expands the remedies available to plans in enforcement of contribution obligations. Section 306 enacts a new section of ERISA which states in pertinent part:

[5/]This conduct also constitutes an unfair labor practice under §8(a)(3) of the Act, 29 U.S.C. §158(a)(3).

"Sec. 515. Every employer who is obligated to make contributions to a multiemployer plan under the terms of a collectively bargained agreement shall to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." [29 U.S.C. §1145]

During Senate debate on this legislation, Senator Harrison A. Williams, a sponsor of MPPAA, explained the legislative purpose of §306 with particular regard to the instant case and the *Higdon* defense upon which it was based:

"Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law—other than 29 U.S.C. §186. *Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.*

In this regard we endorse judicial decisions such as *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); and *Huge v. Long's Hauling Company, Inc.*, 590 F.2d 457 (3rd Cir. 1978). Cases such as *Western Washington Laborers-Employers Health and Security Trust Fund v. McDowell*, _____F. Supp._____, 103 LRRM 2219 (W.D. Wash., 1979) and *Washington Area Carpenters Welfare Fund, et al. v. Overhead Door Company*, C.A. No. 79-0097, U.S.D.C. D.C., April 22, 1980, are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.

> These same principles apply to a plan's claim for employer withdrawal liability assessed in accordance with this legislation. *The public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provision be made to discourage delinquencies and simplify delinquency collection.* The bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans. A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, interest on the contributions owed and liquidated damages. The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies." [126 Cong. Rec. S. 11673 (daily ed., August 16, 1980)] (emphasis added.)

The public policy favoring reversal of a case has seldom been so clear. Respondents suggest that the Ninth Circuit's decision was *mandated* not only by these Congressional pronouncements, but also by the later declarations of this Court in *Kaiser Steel Corporation v. Mullins*, _____U.S._____, 70 L.Ed.2d 833, 102 S.Ct. 851 (January 13, 1982). While defenses of illegality (not involved here) may be cognizable in an action of this type, union majority defenses are not. Instead, they are deemed "unrelated" and "extraneous." See *Mullins*, 70 L.Ed.2d at 846.

The Ninth Circuit's decision joins *Mullins* and MPPAA in reaffirming the precepts of *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960). An employer's promise to pay fringe benefit contributions is inviolate in these circumstances. Since the decision is consistent with the public policy declared by Congress, and endorsed by this Court, a writ of certiorari is unwarranted.[6] As Mr. Justice Marshall recently observed in another ERISA case:

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[6] The conflict presented by the Fifth Circuit's decision in *Baton Rouge Building Trades Council v. E.C. Shafer Construction Company*, 652 F.2d 806 (5th Cir. 1981) is not a sufficient basis for certiorari in light of these recent policy pronouncements.

"Our judicial function is not to second-guess the policy decisions of the legislature no matter how appealing we may find contrary rationales." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 68 L.Ed.2d 402, 415 (1981).

CONCLUSION

For the reasons stated, this Court should deny the writ for certiorari. Alternatively, Respondents request that the Ninth Circuit's decision be summarily affirmed on the basis of §306 of MPPAA.

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